83-1117

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WILLIAM S. LAWSON, JR.,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Richard L. Stradley
Counsel for Petitioner
Post Office Box 128
Victor, Montana 59875
Phone: (406) 642-3774

QUESTION PRESENTED FOR REVIEW

Whether lack of actual notice tolls the jurisdictional ten-day limitation for appeals from final orders in criminal cases.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WILLIAM S. LAWSON, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

William S. Lawson, Jr., by his attorney, respectfully prays that a writ of certiorari issue to review the Order of

the United States Court of Appeals for the Tenth Circuit, filed October 19, 1983.

OPINIONS BELOW

The only opinion at issue herein is the Order and Judgment of the United States Court of Appeals for the Tenth Circuit that dismissed the pending appeal of the Petitioner as being untimely filed. This Order is reported as a Memorandum decision at F2d and is reproduced at pages A-1 to A- herein following.

JURISDICTION

The Order and Judgment sought to be reviewed was signed and filed on October 19, 1983. Since that Order and Judgment required that the mandate of the Court of Appeals issue forthwith, to protect the liberty of the Petitioner, no Petition for Rehearing was filed, rather a Motion for Stay of Mandate was filed and granted, pending

petition for writ of certiorari to this Court.

Jurisdiction of this Court is invoked under 28 USC § 1254 (1).

STATUTES INVOLVED

Rule 4(b) of the Federal Rules of Appellate Procedure, which states:

> (b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or

order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Rule 49(c) of the Federal Rules of Criminal Procedure, which states:

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or releive or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.

United States Constitution, 5th Amendment, which states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case is the second appeal concerning the Defendant's conviction in the District Court of Cheyenne, the honorable Clarence Brimmer presiding, on two counts of violating 26 USC §7203 and one count of violating 26 USC §7205.

The first appeal raised Nine different issues which the Court of Appeals found without merit, except for the right to inspect and copy jury records (670 F2d 973). The case was remanded for inspection, motions and hearing. Said inspection was completed, motions filed, and a hearing was held on June 30, 1982. No decision or indication of how the Court would rule was given at that time, and the matter was

taken under advisement.

The Petitioner/Defendant lives and works in Gilette, Wyoming, at the other end of the State from Cheyenne, Wyoming. Counsel for the Petitioner, now and then, resided in Victor, Montana. The Court and Clerk's Office was aware of Counsel's Victor, Montana address from at least April 21, 1982 and had mailed notices to that address before the hearing in June.

From time to time, from the hearing in June through the first part of December, 1982, Counsel for the Petitioner contacted an attorney with an office in Cheyenne to see if anything had been filed in the case by the Court, and the response was always that nothing had been filed.

The District Court's Order that was being appealed was signed on November 22, 1982, but was not filed until December 21, 1982, as it was then found lying loose in the Court file. According to the Clerk's

Office, a copy was mailed to counsel for the Petitioner, to an old address in Missoula, Montana, and a copy to the Petitioner, both of which came back to the Clerk's Office undelivered. Counsel for the Petitioner has forwarding instructions at all of his old mailing addresses.

Nothing further was done until January 31, 1983 (41 days from the date the Order was filed) when the Clerk's Office called counsel for the Petitioner to inform him of the Order and they were informed by said Counsel that Notice of Appeal would be filed immediately. Notice of Aopeal was filed within Eight (8) days of that phone call, just as soon as Counsel received the copy of the Order in question.

ARGUMENT

The Order and Judgment of the Court of Appeals should be reviewed as the issue presented here is a very important ques-

tion of federal law which has not been, but should be, settled by this Court. In fact, it appears that the question raised here has not been addressed by either this Court or a Federal Court of Appeals since the 1966 amendment to Rule 49(c) of the Federal rules of Criminal Procedure, until this case.

Prior to the 1966 amendment, it appeared to be clear that the "general rule" was that in the event of failure or delay by the Clerk of the Court to send written notice of all orders as required by Rule 49, "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." Lohman v. U.S., 237 F2d 645, 646 (6th Cir. 1956). See also Rosenbloom v. U.S., 355 US 80 (1957), Oddo v. U.S., 171 F2d 854, cert.den. 337 US 943, 69 SCt 1498, 93 LEd 1747 (2nd Cir. 1949), U.S. v. Dunbar, 212

F2d 654, cert.den. 348 US 848, 75 SCt 73, 99 LEd 668 (2nd Cir. 1954), Blunt v. U.S., 244 F2d 355 (C.A.D.C.1957), Carter v. U.S., 168 F2d 310 (10th Cir.1948), and U.S. v. Crawford, 54 FRD 362 (D.C.Minn.1972).

There have been some cases which at first glance seem to be in opposition to the general rule, because in those cases the appeal was not allowed as untimely, even though there was a delay by the Clerk and that issue was raised. See U.S. v. Isabella, 251 Fed 223 (2nd Cir.1958), Wilkinson v. U.S., 278 F2d 604, cert.den. 363 US 829, 80 SCt 1600, 4 LEd2d 1524 (10th Cir. 1960), and Hyche v. U.S., 278 F2d 915, cert.den. 364 US 881, 81 SCt 169, 5 LEd2d 102 (5th Cir.1960).

However, in each of those cases, as well as in the case of U.S. v. Robinson, 361 US 220, 80 SCt 282, 4 LEd2d 259 (1960), the Defendant was appealing a conviction and sentence at which he had been person-

ally present with counsel, and so had personal knowledge of the Court's decision. Therefore, those cases would still fit the general rule, as the Defendants could not claim lack of notice where they were personally aware of the Court's actions.

Since the 1966 amendment, there have been cases which dismissed appeals as untimely, but in each of those cases as well, the person attempting to appeal had personal knowledge of the Court's actions. See U.S. v. June, 503 F2d 442 (8th Cir. 1974), U.S. v. Miles, 510 F2d 1362 (4th Cir.1975), Smith v. U.S., 425 F2d 173 (9th Cir.1970), U.S. v. Jones, 567 F2d 965 (10th Cir. 1977), U.S. v. Lucas, 597 F2d 243 (10th Cir.1979), and U.S. v. Avery, 658 F2d 759 (10th Cir.1981). Therefore, these cases would fit the general rule as well.

To refuse to review the decision in this case sould be to make the requirement of Rule 49(c) of no effect whatsoever, and

instead of counsel being able to rely upon the Clerk's statutory duty, they must instead camp on the Court's doorstep, begging to get information as to when the Court rules on their motions.

In this case, the period of time between the hearing and the ruling on that hearing was some 174 days until the Order was filed. Due to this long delay in the decision of the Court and due to the extreme distances to the Courthouse, the Petitioner had no choice but to rely upon the Clerk's statutory duty to immediately notify him of the Court's Order.

As this Court said in a case concerning Rule 49(c)'s sister rule in civil procedure, Rule 77, "We can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given." Hill v. Hawes, 320 US 520,523, 64 SCt 334,336, 88 LEd 283.

To fail to review the decision in this case would also be to leave an unremoveable stain on the integrity of the federal judiciary, as it would leave unanswered the circumstantial evidence of misconduct in this case, and further make it possible for federal judges in collusion with the office of the clerk to insure that a defendant could not appeal his case, and he would have no recourse for such misconduct.

How, theoretically, could this be done? First of all, the Court would delay in making the decision on the pending motion (in this case 174 days) so that counsel would not know when to expect the ruling.

Then, either no notice would be given of the ruling, or the notice would be mismailed (in this case both the letters to the Petitioner and his counsel were returned to the Clerk's Office undelivered, yet no further attempt was made to contact either the Petitioner or his counsel until

the time to file the Notice of Appeal was passed) to insure that there would be no notice received until it was too late.

Then, perhaps to rub a little salt in the wounds, notice would be given after the time for filing the notice of appeal had expired (in this case, the Clerk's Office contacted counsel for the Petitioner exactly Forty-One [41] days from the date that the Order in question was filed).

To allow this type of interference in a Defendant's appeal process would be to deprive him of his due process rights during appeal. The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily. Boykin v. Huff, 73 App.D.C. 378, 121 F2d 865 (1941).

"The right of defendant to due process does not terminate with verdict and sentence in lower court, and his constitu-

tional rights must be protected to the extent of providing sufficient appeal whenever under the law a judgment is appealable . . . . it is just as true in respect to the right of appeal from a federal judgment that the due process requirements of the Fifth Amendment also require that an appeal of a convicted defendant may not be frustrated." Doyle v. U.S., 366 F2d 394, 398,399 (9th Cir.1966).

Therefore, under these circumstances, failure to review this decision would mean that this Petitioner's due process rights would have been violated, and that in the future, other Defendants could have their due process rights violated under this interpretation of the Federal Rules.

Fourthly, review of this decision would prevent the impending conflict between different federal court of appeals. While there have been no decisions by other circuits than the Tenth directly on the point

being raised here, in at least one other circuit, the Fourth, the Court of Appeals has given an indication that if faced with a similar case, they would decide the case opposite to the way the Tenth Circuit has. In dicta in U.S. v. Miles, supra, in examining the issue of a untimely notice of appeal, the Court stated "Nor does this case contain unique facts which alone excuse noncompliance with the rule. E.g. Fallen v. U.S., 378 US 139, 84 SCt 1689, 12 LEd2d 760 (1964)."

Obviously, the Fourth Circuit agrees with this Court (and disagrees with the Tenth Circuit) concerning the nature of the Federal Rules to begin with. As this Court stated in Fallen v. U.S. at page 142 "Overlooked, in our view, was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. Rule 2 begins with the admonition that

'(t)hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'"

To fail to review the decision herein would be to make the Rules rigid and inflexible, just what this Court deplored in Fallen.

CONCLUSION

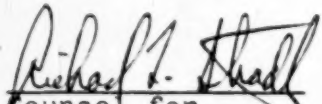
This Court should grant certiorari to settle this important question of federal law, which in the opinion of the Petitioner has been decided incorrectly by the Tenth Circuit Court of Appeals, but nevertheless the issue needs settling to prevent the conflict between the different Circuits over this issue, especially in light of the indications that other Circuits would decide this issue differently.

In addition, from the past decisions of this Court on issues similar to this one and which should be applicable here, the Tenth Circuit has decided this issue in a way in conflict with the applicable decisions of this Court.

Finally, certiorari should be granted here due to the extremely serious nature of the consequences of failure to review the decision below. The integrity of the Federal Court system is at stake.

Respectflly submitted,

WILLIAM S. LAWSON, JR.

By: 
Counsel for
Petitioner

CERTIFICATE

I, the undersigned Richard L. Stradley, Counsel for the Petitioner herein and a member of the Bar of this Court, do hereby certify that I have this date mailed, by

U. S. Mail, first-class postage pre-paid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to counsel for the Respondent, the honorable Richard Stacey, U. S. Attorney, P. O. Box 668, Cheyenne, Wyoming 82001, on this the 3rd day of January, 1984.

Richard L. Stradley

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

F I L E D
United States Court of Appeals
Tenth Circuit
OCT 19 1983
HOWARD K. PHILLIPS
Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 83-1265
	)	(D.C. No.
WILLIAM S. LAWSON, JR.,	)	CR81-005B)
	)	(D. Wyo.)
Defendant-Appellant.	)	

ORDER AND JUDGMENT

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed.R.App.P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This an appeal from the district court's order denying defendant's motion for a new trial. The only question now before the court is whether the notice of appeal was timely filed pursuant to Fed.R. App.P. 4(b).

The challenged Order was filed December 21, 1982, and the notice of appeal was not filed until February 8, 1983. An extension of time to file the notice of appeal was neither sought or granted in the district court.

The law in these situations is clear. The filing of a notice of appeal within the ten-day period prescribed by Rule 4(b), or a proper extension thereof, is mandatory and jurisdictional. Buckley v. United States, 382 F2d 611 (10th Cir. 1967). Counsel's failure to learn of the entry of the order within the time allowed for an appeal does not excuse the failure to request an extension of time from the dis-

trict court. A court of appeals is not authorized to enlarge the mandatory and jurisdictional appeal period. See Fed.R. App.P. 26(b). See 10th Cir. R.17(b)

The appeal is DISMISSED.

The mandate shall issue forthwith.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

F I L E D
DISTRICT OF WYOMING

DEC 21 1982

WILLIAM C. BEAMAN
CLERK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff.	)	
	)	
vs.	)	NO. CR81-
	)	
WILLIAM S. LAWSON JR.,	)	00005-01B
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION TO SET ASIDE CONVICTIONS

THIS MATTER comes on to be heard upon the mandate of the Court of Appeals, Tenth Circuit, requiring an evidentiary hearing upon any contentions of the Defendant arising out of his examination of the jury selection records of this Court. Upon appeal of his convictions by a jury for failing to file 1978 and 1979 federal in-

come tax returns, violations of I.R.C. Section 7203, and for supplying a false and fraudulent withholding certificate to his employer in 1979, a violation of Section 7205. the Court of Appeals affirmed the judgment of this Court by which the Defendant was sentenced to imprisonment of 4 months followed by 3 years' probation. The Court of Appeals, however, required this Court to permit Lawson to inspect the jury selection records pursuant to the provisions of 29 U.S.C. Section 1867(F).

Defendant was granted from April 8, 1982 to April 22, 1982 to inspect such records. On April 21, 1982 his attorney requested and received an extension to May 6, 1982 for such inspection. On May 18, 1982 the Defendant, by his counsel, Richard L. Stradley, Esq., of Victor, Montana, moved this Court to set aside Defendant's convictions and grant him a new trial in "the division of his residence,"

on the ground that this Court's jury selection plan:

(1) Does not provide for a fair cross-section of jurors from the entire district because jury trials in practice are held only in Cheyenne and Casper, with juries selected from those jury divisions and not from the remaining portions of the State:

(2) Permits a Defendant to be tried in Cheyenne before a jury which is "drastically different from those drawn elsewhere," in violation of the Defendant's Sixth Amendment rights or trial by jury.

The Court on June 30, 1982 heard the witnesses of the Defendant and the arguments of counsel, and has read and considered the briefs and authorities submitted by counsel and, being well-advised in the premises, makes the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT

1. A plan for random selection of grand and petit juries was formulated and adopted by the U.S. District Court for the District of Wyoming, pursuant to the Jury Selection and Service Act of 1968 (P.L. 90-274; 28 U.S.C. Section 1861-1869), on July 23, 1968, by the Honorable Ewing T. Kerr. That plan provided that, "To insure impartial trials and at the same time avoid incurring unnecessary expense and unduly burdening citizens of any part of the district with jury service, the District of Wyoming is hereby divided into five divisions for jury selection purposes . . ." It also designated the specific Wyoming counties comprising each jury division and required the maintenance of a Master Jury Wheel for each division in the District with the names of all persons randomly selected from votor registration lists of the counties in each division. The plan was approved by the Court of Ap-

peals, acting as the Judicial Council, of the Tenth Circuit on September 18, 1968.

2. On February 12, 1981 the undersigned as United States District Judge for the District of Wyoming made and entered an Order Compiling Modifications to the District Plan for Random Selection of Grand and Petit Jurors, incorporating all past modifications into one document representing the District's plan for jury selections. The Plan, as amended, divided the District into five divisions for jury selection purposes, so that the Cheyenne Division consists of the Counties of Laramie, Albany, Goshen and Platte, the Casper Division consists of the Counties of Natrona, Converse and Niobrara; the Sheridan Division consists of the Counties of Sheridan, Big Horn, Johnson, Campbell, Crook and Weston; the Lander Division consists of the Counties of Fremont, Hot Springs, Washakie and Park: and the Evan-

ston Division consists of the Counties of Uinta, Carbon, Sweetwater, Lincoln, Sublette and Teton. This Order Compiling Modifications to the District Plan was approved by the Court of Appeals, acting as the Judicial Council, of the Tenth Circuit, on March 17, 1981.

3. While 28 U.S.C. Section 131 designates Cheyenne, Casper, Lander, Sheridan and Evanston as places of holding Court, there are courtrooms with adequate jury facilities only at Cheyenne and Casper, and those facilities at Casper are old and out-of-date but adequate. The federal courtroom at Sheridan was relinquished by the Administrative Office of the U.S. Courts and demolished by the General Services Administration prior to 1975. The Federal courtroom at Evanston was relinquished by the Administrative Office of the U.S. Courts also. It is now possessed by the U.S. Post Office Department. It

has not been used in more than 30 years and has no courtroom furniture in it. The courtroom at Lander is antiquated, without tables and chairs in the jury room. This, the only places where jury trials can be held in this District are Cheyenne and Casper. There is now pending before Congress legislation to make Jackson a place of holding court, in order to serve the western part of Wyoming but no courtroom exists there as yet in which federal trials can be held.

4. Over 50% of the jury trials in this District are held in Cheyenne and the balance of them are held in Casper because Cheyenne is the place of the principal office of the Court, where its clerks and records are and where the offices of the United States Attorney, United States Marshal and probation officers are located, and where the great majority of its work must be done, and also because while

trials are in progress in Cheyenne, motions, pretrial conferences, arraignments and pleas can be heard during recess periods. And, too, the principal federal offices, from which prosecution may issue, are in Cheyenne.

5. William C. Beaman became the Clerk of this Court in May, 1978. The Court's jury plan requires him to manage the jury selection process. He was then ordered by the undersigned to select all jurors in exact conformance to the statutes of the United States and the jury plan of this Court. He testified that he has done so. Jurors in the Cheyenne and Casper Divisions have been selected at random. There is no credible evidence whatsoever to support Defendants' claims that (a) there have been irregularities in the jury selection process of this Court, (b) that the judges of this Court have culled the jury lists, (c) that the judges of this

of this Court have ordered the Clerk to hold some jurors over to another jury wheel.

6. The Court also takes judicial notice of the public transportation system in Wyoming. Cheyenne is served by rail and air transportation and is at the hub of an east-west north-south all-weather highway system. Casper is served by good air transportation routes, and is nearly centrally located at the hub of an all-weather highway system. However, Sheridan now has little or no air service, no rail service, and is a 6 hour drive from Cheyenne; Lander and Evanston are similarly situated and are further from Cheyenne. Such transportation facilities are important for parties getting witnesses to and from trials.

7. Defendant alleged that (a) the juror qualification forms had notations that the person should not be used unless

absolutely necessary, (b) an extremely large number of jurors were permanently excused, and (c) that the judges ask the Clerk to hold over jurors and retain their names in the jury wheel. The Clerk of the Court examines the juror qualification forms when received and may have made notations on them, but that was not shown to be anything more than an isolated instance which was not explained. Jurors are excused permanently by the judges of the Court for reasons of hardship, medical causation or age. One juror, Robert I. Russin, of Laramie, Wyoming, who is a nationally known sculptor, was excused by the undersigned from one jury panel so that he could complete a fountain in the City of Casper and a bust of Issac Bashevis Singer, an author, on the condition that he serve on the next panel; his name was held over and he served. There was no other evidence to support those

claims [7(a), 7(b) and 7(c)] of the Defendant.

8. The jury selection process in the District of Wyoming has been administered so as to insure a fair and random cross-section of the population of the jury wheel division in which the Court has held jury trials. No persons, or groups of persons have been systematically excluded from jury service. No occupational groups of persons have been either systematically excluded or intentionally included in the jury selection process.

CONCLUSIONS OF LAW

1. The Defendant, William S. Lawson, contends that his Sixth Amendment right to a jury trial has been abridged by the jury selection procedures followed in the District Court for Wyoming. The practices in question are allegedly in violation of 28 U.S.C. Sections 1861-1863.

2. The Defendant is not entitled to a

to a trial in whatever locale he determines will provide a jury wheel most advantageous to his case; he is merely entitled to a fairly-selected jury wheel in the District or division where the Court convenes. 28 U.S.C. 1861. "The Jury Selection and Service Act specifically provides for splitting a district into divisions and using only one division's jury wheel for petit juries . . .. Likewise, a petit jury may be drawn constitutionally from only one division and not the whole district." U.S. v. Smith. 463 F.Supp. 680 (E.D.Wis., 1979); Ruthenberg v. U.S. 245 U.S. 480, 38 S.Ct. 168, 62 L.Ed. 414 (1918).

3. Since Defendant Lawson was not entitled to be tried by a jury drawn from the Sheridan wheel, the only remaining issue is whether the manner in which the Cheyenne wheel was created violated his rights under the Sixth Amendment and 28

U.S.C. Section 1861 et seq.

4. The standards to be applied in considering the constitutional and statutory claims are functionally equivalent, U.S. v. Test, 550 F.2d 577, 584 (10th Cir., 1976). Therefore, the claims need not be separated.

5. The applicable standard for adjudicating this challenge to the jury selection plan for the District of Wyoming is that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 697, 42 L.Ed. 2d 690, 703 (1975).

6. In order to demonstrate that the jury wheel for Cheyenne was not reasonably representative of the community, Defendant Lawson must first show the existence of

some cognizable group that has been excluded. U.S. v. Test, supra. Establishing cognizability requires proof of the following:

> "(1) the presence of some quality or attribute which 'defines and limits' the group:
> (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and
> (3) a 'community of interest' which may not be represented by other segments of society."
> U.S. v. Test, supra at 591.

7. There is no evidence in the record that the group of persons who are employed in the "industrial wage" occupations are a cognizable group under the standard of U.S. v. Test. The alleged 'quality or attribute' that distinguishes this group is quite vague. Indeed, Defendant has advanced no reasons why non-salaried railroad laborers are not included in this 'group' for purposes of calculating jury representation. Furthermore, there has been no proof offered

whatsoever that members of this group hold attitudes which are distinctive from the population at large, or which cannot be represented adequately by persons employed in other occupations.

8.. Although Defendant has indicated the existence of a group which is describable for purposes of demographics, he has not cited a group which is legally cognizable under the U.S. v. Test test. This Court adopted the view of U.S. v. Greene, 489 F.2d 1145 (D.C. 1973), cert. den. 419 U.S. 977, reh. den., 429 U.S. 1041 (1974) is seeing:

> ". . . serious problems in a legal claim based on statistical underrepresentation of a sub-class of the young, the middle-aged, the middle-income, manual laborers, college graduates, and so on, ad infinitum, as to all the matters that some lawyers may identify as having a bearing on the jury's action." U.S. v. Greene, supra, at 1150.

9. In any case, Defendant Lawson has failed to prove that the group in question

has been underrepresented at all. In fact, he concludes that industrial wage earners, as well at government employees, are represented in the Cheyenne jury wheel in approximate relation to their percentages in the general Cheyenne division population. The law entitles him to no more.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Defendant's motion for a new trial be denied, that Defendant's motion to set aside his conviction be denied, and that Defendant's challenges to the jury selection plan of this Court are each denied. It is further

ORDERED that in the event the Defendant has not filed his notice of appeal from this Order with ten (10) days from this date, the Defendant shall report to the U.S. Marshal for the District of Wyoming to commence serving his sentence by 12:00 P.M. of the 11th day from this

date.

Dated this 19th day of November, 1982.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE

No. 83-1117

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM S. LAWSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed as untimely petitioner's appeal from the denial of a motion to set aside his conviction and grant him a new trial.

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OCTOBER TERM, 1983

No. 83-1117

WILLIAM S. LAWSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) dismissing petitioner's appeal as untimely is unreported. The opinion of the district court (Pet. App. B1-B17) denying petitioner's motion to set aside his conviction and for a new trial is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1983. No extension of the time for filing a petition for a writ of certiorari was sought. The petition was filed on January 6, 1984, and it is therefore untimely. See Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of willful failure to file federal income tax returns for

1978 and 1979, in violation of 26 U.S.C. 7203, and willful supplying of a false and fraudulent withholding certificate to his employer in 1979, in violation of 26 U.S.C. 7205. He appealed to the United States Court of Appeals for the Tenth Circuit, contending that the trial court had erred in denying various pretrial motions and motions for acquittal, in making certain evidentiary rulings, in instructing the jury, and in sentencing him. Petitioner also asserted that the jury's verdict was against the weight of the evidence and contrary to law. The court of appeals rejected all of petitioner's contentions except a claim that the district court had erred in denying petitioner's pretrial motion to inspect and copy jury selection records. The court remanded the case to the district court to allow petitioner's counsel to inspect the relevant documents as permitted by 28 U.S.C. 1867(f) and to file an appropriate motion pursuant to 28 U.S.C. 1867(a) and (d). The court affirmed petitioner's conviction in all other respects. *United States* v. *Lawson*, 670 F.2d 923 (10th Cir. 1982).

2. Pursuant to the court of appeals' decision, petitioner's counsel was permitted to inspect the jury selection records (Pet. App. B2). Thereafter, on May 18, 1982, petitioner moved the district court to set aside his conviction and grant him a new trial in "the division of his residence"[1] on the ground that the district court's jury selection plan did not provide for a fair cross-section of jurors from the entire district and permitted a defendant to be tried in Cheyenne, Wyoming, before a jury that was "drastically different from those drawn elsewhere [in the district]," in violation of petitioner's Sixth Amendment rights (*id.* at B2-B3). In an

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[1]Petitioner apparently resides in the Sheridan division of the district court (see Pet. App. B12). As the district court noted, "[t]he federal courtroom at Sheridan was relinquished by the Administrative Office of the U. S. Courts and demolished by the General Services Administration prior to 1975" (*id.* at B6).

order filed on December 21, 1982, the district court denied petitioner's motion (*id.* at B1-B17).

3. In his petition (Pet. 6-7), petitioner sets forth the following allegations: he lives in Gillette, Wyoming, and his counsel "now and then, resided in Victor, Montana"; the district court and its Clerk's office knew of his counsel's Victor, Montana, address from at least April 21, 1982, and had mailed notices to that address before the hearing on his motion in June 1982; from the time of the hearing through the first part of December 1982, petitioner's counsel from time to time contacted an attorney with an office in Cheyenne, Wyoming, to find out whether the court had ruled and was told that nothing had been filed by the court;[2] the Clerk's office mailed a copy of the district court's order of December 21, 1982, to petitioner's counsel at a former address in Missoula, Montana, and the copy was returned to the Clerk's office undelivered; on January 31, 1983, 41 days after the order was filed, the Clerk's office called petitioner's counsel and told him of the order; and counsel informed the Clerk's office that a notice of appeal would be filed immediately. Petitioner filed a notice of appeal on February 8, 1983 (Pet. App. A2).

4. The court of appeals dismissed petitioner's appeal as untimely (Pet. App. A1-A3).The court pointed out that petitioner had failed to seek an extension of time to file a notice of appeal in the district court and held that his counsel's failure to learn of the entry of the district court's order within the time allowed for an appeal did not excuse the failure to request an extension of time from the district court.

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[2]Petitioner does not give any reason why his counsel never contacted the Clerk's office directly, nor does he explain why, having made periodic third-party inquiries as to the status of his motion from June through early December, petitioner's counsel apparently then ceased any efforts to keep informed of the status of his case.

ARGUMENT

Petitioner argues (Pet. 7-17) that this Court should review the question whether the lack of actual notice of an order tolls the 10-day period for filing a notice of appeal from a final order in a criminal case.[3] Petitioner acknowledges (Pet. 14-15) that there is no conflict among the circuits on this issue. Moreover, petitioner's arguments are squarely foreclosed by Fed. R. App. P. 4(b) and Fed. R. Crim. P. 49(c). Accordingly, this Court's review is not warranted.[4]

1. Fed. R. App. P. 4(b) provides that a notice of appeal by a defendant in a criminal case must be filed within 10 days after entry of the judgment or order to be appealed. Rule 4(b) further provides that the district court may grant a 30-day extension of time for filing a notice of appeal in a criminal case "[u]pon a showing of excusable neglect." The court of appeals may not grant an extension (Fed. R. App. P. 26), and it is settled that the 30-day "grace period" permitted by Rule 4(b) may not be extended. *United States* v. *Hoye*, 548 F.2d 1271, 1273 (6th Cir. 1977); *United States* v. *June*, 503 F.2d 442, 443-444 (8th Cir. 1974). Further, this Court has held that the filing of a notice of appeal within the prescribed time is "mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 224 (1960) (footnote omitted).

Fed. R. Crim. P. 49(c) expressly provides that "[l]ack of notice of the entry [of an order made on a written motion subsequent to arraignment] by the clerk does not affect the

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[3]Petitioner does not contend that he did not receive notice of the court of appeals' decision, nor does he offer any other explanation to justify the untimely filing of the instant petition for a writ of certiorari.

[4]The Court declined to review an identical claim in *James* v. *United States*, cert. denied, 459 U.S. 1044 (1982).

time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure." Rule 4(b) does not include failure of the clerk to provide notice of the entry of a judgment or order as one of several occurrences that tolls the running of the period within which a notice of appeal must be filed. Thus, the rules unequivocally establish that petitioner's notice of appeal was untimely. *United States* v. *Schuchardt*, 685 F.2d 901 (4th Cir. 1982); *Hensley* v. *Chesapeake & O. Ry.*, 651 F.2d 226 (4th Cir. 1981); *Silvia* v. *Laurie*, 594 F.2d 892 (1st Cir. 1979); *In re Morrow*, 502 F.2d 520 (5th Cir. 1974); *Weedon* v. *Gaden*, 419 F.2d 303, 306-308 (D.C. Cir. 1969).

Rule 49(c) was amended in 1966 to eliminate the possibility of an extension of time to appeal beyond the 30-day "excusable neglect" period allowed by Fed. R. App. P. 4(b). As petitioner points out (Pet. 8-9), several cases decided *before* the amendment stood for the proposition that in the event of a delay by the clerk in giving notice of a judgment or order, "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." *Lohman* v. *United States*, 237 F.2d 645, 646 (6th Cir. 1956); see also *Rosenbloom* v. *United States*, 355 U.S. 80 (1957). But petitioner acknowledges (Pet. 8) that no case has so held since the amendment. Indeed, it is clear from the Notes of the Advisory Committee that the 1966 amendment was intended to overrule the pre-amendment cases. The advisory committee notes on the similar amendment to Rule 77 of the Federal Rules of Civil Procedure, which went into effect in 1948, make the same point. That amendment was expressly intended to overrule this Court's decision in *Hill* v. *Hawes*, 320 U.S. 520 (1944), on which petitioner

relies (Pet. 11).[5] It is thus clear that the court of appeals correctly dismissed petitioner's appeal.

2. To be sure, the result in this case, although plainly required by the applicable rules, may seem harsh. That harshness is mitigated, however, by the clearly frivolous nature of the appeal that petitioner has been foreclosed from pursuing. Petitioner's challenge is to the jury selection plan for the District of Wyoming; specifically, he objects to the fact that, although the plan divides the District into five "divisions," in practice jury trials are held only in the Cheyenne and Casper divisions.[6] Accordingly, residents of the other three divisions are not selected for federal jury duty. Pet. App. B2-B3.

The district court rejected petitioner's challenge in light of the following findings of fact (Pet. App. B6-B8):

> 3. While 28 U.S.C. Section 131 designates Cheyenne, Casper, Lander, Sheridan and Evanston as places of holding Court, there are courtrooms with adequate jury facilities only at Cheyenne and Casper, and those

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[5]Petitioner also relies (Pet. 15-16) on this Court's decision in *Fallen* v. *United States*, 378 U.S. 139 (1964), in which the Court concluded that, in the unique circumstances of that case, petitioner's untimely notice of appeal should be excused. Fallen was unrepresented by counsel (378 U.S. at 142), he was ill (*id.* at 140 n.2), he was "whisked away from the place of trial * * * on the day after he was sentenced, and * * * not permitted to have visitors, nor afforded the opportunity to secure another attorney" (*id.* at 142-143), and it appeared that the notice of appeal he prepared himself failed to reach the Clerk's office in timely fashion only because prisoners' mail pick-ups were limited to twice a week (*id.* at 143). Petitioner's case hardly compares with the unusual combination of special circumstances present in *Fallen*.

[6]There are no statutory divisions within the District of Wyoming (28 U.S.C. 131). The "divisions" for purposes of jury selection are the counties surrounding the places where court is authorized to be held. See 28 U.S.C. 1869(e)(2).

facilities at Casper are old and out-of-date but adequate. The federal courtroom at Sheridan was relinquished by the Administrative Office of the U.S. Courts and demolished by the General Services Administration prior to 1975. The Federal courtroom at Evanston was relinquished by the Administrative Office of the U.S. Courts also. It is now possessed by the U.S. Post Office Department. It has not been used in more than 30 years and has no courtroom furniture in it. The courtroom at Lander is antiquated, without tables and chairs in the jury room. Thus, the only place where jury trials can be held in this District are Cheyenne and Casper. There is now pending before Congress legislation to make Jackson a place of holding court, in order to serve the western part of Wyoming but no courtroom exists there as yet * * *.

4. Over 50% of the jury trials in this District are held in Cheyenne and the balance of them are held in Casper because Cheyenne is the place of the principal office of the Court, where its clerks and records are and where the offices of the United States Attorney, United States Marshal and probation officers are located, and where the great majority of its work must be done, and also because while trials are in progress in Cheyenne, motions, pretrial conferences, arraignments and pleas can be heard during recess periods. * * *

A virtually identical challenge to the practice of holding most jury trials in Madison, Wisconsin, rather than in other "divisions" in the Western District of Wisconsin was rejected in *United States* v. *Raineri*, 670 F.2d 702 (7th Cir.), cert. denied, 459 U.S. 1035 (1982). Petitioner's claim is no more meritorious than the claim in *Rainerí*; in both cases, alternative courtroom facilities were unavailable. 28 U.S.C. (Supp. V) 142 provides that "Court shall be held only at

places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States." In addition, as the district court found (Pet. App. B7-B8), holding jury trials in Cheyenne results in much greater efficiency for the overall administration of the court's business; trials held in Sheridan, which "has little or no air service, no rail service, and is a 6 hour drive from Cheyenne" (*id.* at B9), obviously would have a significant adverse impact on the prompt administration of justice within the district. See *Raineri*, 670 F.2d at 706.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

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[7]Petitioner also appears to have argued in the district court that there were certain irregularities in the Clerk's administration of the jury selection plan. The district court's opinion demonstrates that petitioner's challenges were frivolous (Pet. App. B8-B10).

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